IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 213

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI and HARRY B. RILEY, as members of the State Board of Equalization of the State of California, STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA and U. S. WEBB, the Attorney General of the State of California,

Appellees.

BRIEF OF APPELLEES

U. S. WEBB,
Attorney General of the State of California,

H. H. LINNEY,
Deputy Attorney General,

JAMES J. ARDITTO,
Deputy Attorney General,
Attorneys for Appellees.

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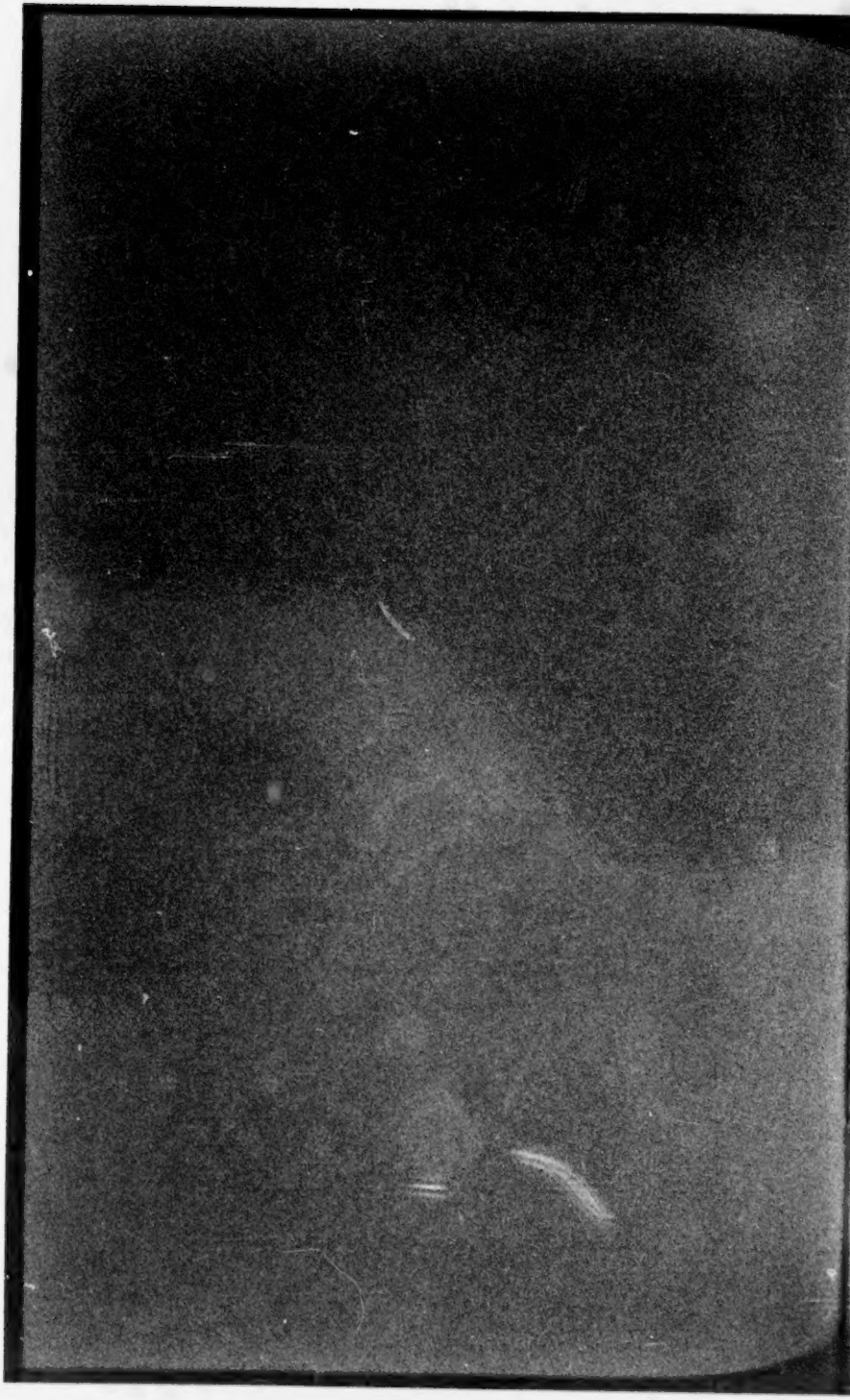

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FOREWORD

This case comes to this court on appeal from a three-judge district court decision, contemporaneously with the appeal in the case of *Southern Pacific Company* vs. *Corbett et al.*, No. 212 of this term (23 Fed. Supp. 197).

We have filed our brief in the *Southern Pacific* case and inasmuch as the two cases are practically identical we feel that in this brief we should confine ourselves strictly to this appellant's argument without repetition, in so far as it is avoidable, of the arguments made by us in our brief in the *Southern Pacific* case.

Here the "Specification of Errors" includes ten, of which three relate to conclusions of law drawn by the lower court; five relate to the failure or refusal of the lower court to make conclusions of law requested by appellant, and the last two refer, respectively, to the denial of a permanent injunction and the decree that the bill of complaint be dismissed.

STATEMENT OF THE CASE

Except as qualified by the following summary of the pertinent facts we adopt appellant's "Statement of the Case" (brief pp. 2-4).

Pertinent provisions of the "Stipulation of Facts" show that (a) all the property in question was purchased with the intention to store, withdraw from storage and to install the same as part of appellant's telephone system (R-63, par. 3);

(b) That the uses mentioned in (a) above occur only after termination of the interstate transportation of such property (R-70, par. 17, and R-73, par. 23);

(c) That after the termination of interstate transportation of the property, the same is stored in

the State of California and thereafter withdrawn from storage (R-70, par. 18, and R-73 and 74, pars. 24 and 26);

(d) That after termination of the interstate transportation of the property, the same is installed in the telephone system in California (R-70, par. 17; R-74, pars. 26 and 27, and R-75, pars. 29, 30 and 31);

(e) That after termination of the interstate transportation of the property and installation thereof as part of appellant's telephone system, the same is used in appellant's inextricably commingled interstate and intrastate commerce (R-62 and 63, pars. 2 and 3).

In the light of the above summary of the facts we respectfully refer the court to our discussion, in the brief in the *Southern Pacific* case, of the nature of the California use tax.

Inasmuch as the appellant's argument is not devoted to the alleged errors, we will disregard them and address our argument to the points specifically argued by appellant as follows:

ARGUMENT

A

"SINCE THE PROPERTY IN QUESTION IS USED IN INTERMINGLED INTERSTATE AND INTRASTATE COMMERCE, AND SINCE THERE IS NO 'STORAGE, USE OR OTHER CONSUMPTION' THEREOF IN CALIFORNIA, EXCEPT AS PART OF SUCH INTERMINGLED COMMERCE, THE USE OF THE PROPERTY CAN NOT CONSTITUTIONALLY BE SUBJECTED TO A FLAT RATE TAX WITHOUT APPORTIONMENT FOR THE DIVISION OF USE BETWEEN INTERSTATE AND INTRASTATE COMMERCE"

"1. General Principles"

Under this heading appellant discusses the general rule that a state tax which imposes a direct burden upon interstate commerce is invalid and seeks to apply that rule here, as the Southern Pacific Company attempted to do in its brief.

Reliance is again placed upon the *Helson* case and appellant argues from the standpoint that the first opinion of the lower court was correct and the second opinion incorrect.

In order to reach this conclusion appellant adopts this premise (brief, p. 11):

> "The tax involved in the case at bar thus presents, for want of apportionment, the same legal question as if it had been laid upon property used exclusively in interstate commerce."

This premise, of course, we do not concede. We are unable to understand, and appellant does not satisfactorily explain, why a tax upon an intrastate event, namely, storage, use or other consumption within the state, is identical with a tax upon property used *exclusively in interstate commerce.*

In our brief in the *Southern Pacific* case we have referred to the distinction between the two situations and have cited and discussed the decisions of this court which recognize the distinction and on that basis uphold state statutes which do not transgress the forbidden boundary (Appellees' Brief, *Southern Pacific* case, p. 8, *et seq.*).

Gregg Dyeing Co. vs. *Query,* 286 U. S. 472;
Nashville, etc. Ry. Co. vs. *Wallace,* 288 U. S. 249;
Coverdale vs. *Arkansas Louisiana Pipe Line Company,* 303 U. S. 604,

and other cases cited under Point III.

The *Helson* case is on one side of the line, while the *Nashville, Query, Coverdale* and many other cases, are on the other side of the line.

When we have a case which admittedly falls within the *Helson* case, it is proper to argue that that case is controlling. Conversely, when we have a case, as here, the facts of which show that it falls within the *Nashville* case, and others of similar background, we think it is not only proper but indispensable that this line of cases be deemed controlling.

"2. The Decision Below"

It is here contended that even if the lower court's decision was correct as to stand-by property (see Stipulation of Facts, pars. 20 to 39; R., 72-100), it was erroneous as applied to specific order equipment since, according to appellant's contention, there is no "storage use" or "withdrawal use" of such equipment prior to actual installation in appellant's interstate-intrastate telephone system. This contention is more fully developed under the next succeeding heading.

"3. Specific Order Equipment"

Specific order equipment is described in the Stipulation of Facts (R., pp. 67-72 and 75-77, pars. 11-19 and 29-34).

More particularly such equipment is described in paragraph 11 of the Stipulation of Facts (R., 67) as follows:

> "Specific order equipment consists of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, central office cable, wire, protectors and other component parts of telephone and telegraph lines."

Paragraph 17 of the Stipulation of Facts (R., 70) relates to the installation of specific order equipment and it is therein stated that such equipment, *after termination of the interstate shipment thereof,* is installed either by appellant's own employees or by experts hired for that purpose.

Paragraph 18 of the Stipulation of Facts (R., 70) is here quoted in full for the convenience of the court:

"There is no holding, in any warehouse, storeroom or other like place of deposit, of any of the specific order equipment after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such equipment is retained or held in the possession of the plaintiff and is not in motion in the course of installation thereof, occur between the time of termination of the interstate shipment thereof and the time when the installation of such equipment is completed and said equipment is available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from the dock or car and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. In practically all installation projects the process of connecting parts of the equipment with and into plaintiff's physical plant is under way before the gathering of all equipment involved in the project at the place of connecting the same with said plant is complete. There is no retention or holding of

any of said equipment except such as necessarily occurs in the ordinary and efficient course of transporting said equipment to its ultimate destination and installing it as physically connected parts of plaintiff's telephone and telegraph plant.

With reference to private branch exchange switchboards only, in exceptional instances it occurs that a subscriber orders such a switchboard for installation at a particular time, and that, because of construction delays and for like reasons, the place where such switchboard is to be installed is not ready when plaintiff receives such switchboard at the end of the interstate shipment thereof. Plaintiff then holds such switchboard at some convenient place until the place of installation is ready, and then installs the same as hereinabove described. The period of such holding, in the experience of plaintiff, rarely exceeds a few days."

Notwithstanding the fact, as clearly appears from the foregoing, that the interstate shipment of this equipment has terminated and the property has come to rest in the state and thereafter been stored and installed appellant proceeds to argue (brief, page 13) that "since there is no storage of the specific order equipment, that equipment falls indistinguishably within the decisions of this court, which have been cited." (Apparently referring to the *Helson*, *Bingaman* and *Cooney* cases previously cited.)

In the *Helson* case (279 U. S. 245) the facts were very different from the facts here and that case has

been distinguished by this court, probably the last occasion being in the *Coverdale* case (303 U. S. 604).

In the *Helson* case interstate commerce only was involved. When the gasoline there sought to be taxed arrived in the taxing state it was already in use in interstate commerce and at all times thereafter continued to be used in such commerce. It never came to rest in the state.

In the *Bingaman* case (297 U. S. 626) the same problem was presented as in the *Helson* case.

The *Cooney* case (294 U. S. 384) involved an occupational business tax laid *indiscriminately* upon telephone companies regardless of the type of business engaged in, that is, whether interstate or intrastate. The tax was imposed upon every person, etc. operating telephone lines and furnishing telephone service in the State of Montana, measured by the number of telephones used, controlled or operated.

The *Cooney* case was not concerned with a use tax on the *intrastate* use of telephones. At this point we respectfully refer the court to our brief in the *Southern Pacific* case (No. 212, this term) wherein we discussed the right of the State of California to impose a use tax upon purely intrastate uses, namely, storage, withdrawal from storage and installation (all of which occurred in the instant case prior to the use of the property as instrumentalities of interstate and intrastate commerce).

"4. Stand-By Facilities"

Stand-by facilities or equipment of the telephone company are different from stand-by equipment of the railroad company only in the character of the property. There can be no different application of legal principles to the stand-by property of the Southern Pacific Company from that of the appellant here.

That a telephone system can not operate satisfactorily without stand-by equipment may be conceded. Neither could a grocery store successfully or satisfactorily serve its customers without having a reserve of commodities on hand, whether they are on display or are kept in storage. Surely it will not be argued that such property is not part of the mass of property within the state, subject to the state's taxing laws.

"5. Cases Relied Upon By the Trial Court"

Here appellant discusses the cases referred to by the trial court in its second opinion as having been decided by this court *after* the first opinion of the lower court was announced. These cases are:

(a) *Western Live Stock* vs. *Bureau of Revenue,* (1938), 303 U. S. 250;

(b) *Helvering* vs. *Mountain Producers Corp.* (1938), 303 U. S. 376, and

(c) *Coverdale* vs. *Arkansas Louisiana Pipe Line Co.* (1938), 303 U. S. 604.

Appellant seeks to distinguish these cases along with the *Nashville* case (288 U. S. 249) and the *Edelman* case (289 U. S. 249).

We readily concede that the *Mountain Producers* case, (b) above, is not in point here owing to the wide difference in facts and the different principles of law involved.

While the facts in the *Western Live Stock* case, (a) above, are different from the facts here, this court there reviewed the general principles of law applicable to state taxation affecting interstate commerce, and noted the distinction between valid and invalid statutes.

The court stated the question as follows:

> "Section 201, c. 7, of the New Mexico Special Session Laws of 1934, levies a privilege tax upon the gross receipts of those engaged in certain specified businesses (Note No. 1). Subdivision 1 imposes a tax of 2 per cent of amounts received from the sale of advertising space by one engaged in the business of publishing newspapers or magazines. The question for decision is whether the tax laid under this statute on appellants, who sell without the state, to advertisers there, space in a journal which they publish in New Mexico and circulate to subscribers within and without the state, imposes an unconstitutional burden on interstate commerce."

In the course of its decision this court said:

> "In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and

selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co.* v. *St. Louis, supra,* 462. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen* v. *Shelby County Taxing District, supra,* sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

Viewed only as authority, *American Manufacturing Co.* v. *St. Louis, supra,* would seem decisive of the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and

publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce, Cf. *Puget Sound Stevedoring Co.* v. *Tax-Comm'n,* 302 U. S. ____, ____. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & Light Co.* v. *Pfost, supra; Federal Compress & W. Co.* v. *McLean,* 291 U. S. 17, or by its value. *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter."

The tax was held to be valid.

If a state tax on a local privilege (that of "providing and selling advertising space in a published journal") is valid when measured by the *selling* price (or gross receipts) of such advertising, it would certainly appear that the converse would also be true, namely, that the value of the local privilege could be measured by the *purchase* price of goods, wares and materials used in the exercise of the privilege. In the case at bar the local privilege is measured by the *purchase* price of goods which seems to be as fair a way to measure the tax as to measure it by a selling price.

The *Coverdale* case, (c) above, has been reviewed and discussed in our brief in the *Southern Pacific* case and we respectfully refer the court to our argument in that brief.

The *Nashville* and *Edelman* cases are also referred to here by appellant, and it is said (brief, p. 2) that the maintenance of telephone stand-by facilities is unlike the storage of gasoline. Where the difference is, in principle, we are unable to discover, and we submit that appellant has not pointed it out.

B

PROPERLY CONSTRUED, THE STATUTE DOES NOT TAX THE USES HERE SHOWN.

It is true, as appellant here states, that the Supreme Court of California has not yet passed upon the provisions of the Use Tax Act.

Trial courts of the state have, however, upheld the statute both as to intrastate use and as to inextricably commingled intrastate and interstate use.

Appellant here argues (brief, p. 22) that its property is not wholly used within the state but that "the use and service of each instrumentality necessarily extends outside of the State." From this appellant concludes that the act does not impose any tax upon the use of such property.

In answer to this contention we respectfully refer the court to our Statement of the Case wherein we referred to pertinent paragraphs of the Stipulation of Facts showing that all of the materials in

question herein were purchased with the intention of storing, withdrawing from storage, installing as part of appellant's telephone system, and thereafter using said materials in the operation of the telephone system, and, further, that all of said materials were actually so used, and that all of said uses occurred wholly in the State of California.

C

USE TAX MAY LEGALLY BE IMPOSED UPON THE INTRASTATE USE OF MATERIALS AND SUPPLIES EVEN THOUGH THE SAME ARE SUBJECT TO AN INTERSTATE USE

Heretofore we have relied principally upon the argument that the tax is applicable to all property involved in both of these cases, inasmuch as there is, in respect to such property, either storage, withdrawal from storage or installation of the same, and that either of these events is sufficient to justify the imposition of the tax since they are alike events local in character.

We now come to our final proposition which is this:

That assuming there is no previous storage, or withdrawal from storage, the fact of intrastate use, even though it be inextricably commingled with interstate use, is sufficient to justify the imposition of the tax.

The argument now to be presented is applicable not only to this case but also to the *Southern Pacific* case (No. 212, this term).

Again may we remind the court that the act by its terms and as it is administered imposes the tax upon the privilege of storage, use or other consumption in the state and that the amount of the tax is measured by the purchase price and is not in any way affected by interstate use, or by gross receipts.

A company engaged solely in intrastate commerce would pay exactly the same tax as any other company, on an identical purchase. There is no recurrence of the tax, and in this respect it is unlike a property tax which recurs annually.

The privilege of local use is a taxable privilege.

Henneford vs. *Silas Mason Company*, 300 U. S. 577.

If local use only were involved, the *Silas Mason* case would be determinative of the question. But it is contended that because the local use is combined inextricably with an interstate use, the tax is a direct burden upon interstate commerce and therefore invalid.

If the tax upon the local use or privilege of local use were measured by gross receipts from *all* uses, there might, under the authoritative cases, be merit in the contention. We know, however, that such is not the case here. The interstate use adds nothing to the amount of the tax, so that it is impossible to vision a burden upon such use or a discrimination against it.

In this connection see the case of *Raley & Bros.* vs. *Richardson* (1923), 264 U. S. 157.

In the *Raley* case the question before the court was the validity of a state tax at a flat sum upon brokers soliciting orders from dealers in the state, which orders were sent to be filled sometimes to nonresident and sometimes to resident principals, the greater part of the business being with nonresident principals.

Mr. Justice Sutherland for the court said:

"The contention is that the tax is laid, expressly, upon all brokers and commission merchants in the State and upon the business done by them, whether interstate or intrastate, without separating one from the other. The state courts, by whose construction we are bound, held that the statute did not apply to interstate business; and we consider it as though it so provided in terms. It was held, however, that inasmuch as Class B complainants were engaged in intrastate business they were subject to the tax, and none the less because they were also engaged in interstate business. With this conclusion we fully agree.

The complainants were definitely engaged in the domestic business described in the statute and were liable to the tax, irrespective of the extent of it and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, but the former a mere incident of the latter, the burden was upon complainants to

furnish the proof; in which case a different question would arise. *Kehrer* v. *Stewart*, 197 U. S. 60, 69. Certainly, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business."

In

Cooney vs. *Mountain States Tel. Co.*, 294 U. S. 384,

at page 392, the *Raley* case was cited with approval together with the following cases:

Ratterman vs. *Western Union Telegraph Co.*, 127 U. S. 411;
Pacific Express Co. vs. *Seibert*, 142 U. S. 339;
Lehigh Valley R. Co. vs. *Pennsylvania*, 145 U. S. 192;
Postal Telegraph Cable Co. vs. *Charleston*, 153 U. S. 692;
Osborne vs. *Florida*, 164 U. S. 650;
Pullman Co. vs. *Adams*, 189 U. S. 420;
Allen vs. *Pullman Co.*, 191 U. S. 171;
Kehrer vs. *Stewart*, 197 U. S. 60;
Ohio Tax Cases, 232 U. S. 576;
St. Louis Southwestern Ry. Co. vs. *Arkansas*, 235 U. S. 350;
People ex rel. Cornell Steamboat Co. vs. *Sohmer*, 235 U. S. 549;
Postal Telegraph Cable Co. vs. *Richmond*, 249 U. S. 252;
Postal Telegraph Cable Co. vs. *Fremont*, 255 U. S. 124;
East Ohio Gas Co. vs. *Tax Commission*, 283 U. S. 465.

It seems clear, therefore, that the court was of the opinion that the *Cooney* case was distinguished by its particular facts from the *Raley* case and the other cases cited above upon which we rely here.

In *Pacific Telephone and Telegraph Company* vs. *Tax Commission*, 297 U. S. 403, 414, where the *Cooney* case was distinguished, this court, speaking through Mr. Justice Brandeis, held:

(a) A tax upon a local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce;

(b) In its effect upon interstate commerce an occupation tax upon local business does not differ from an *ad valorem* property tax upon tangible property used exclusively in such business. Each increases the necessary cost of doing the local business;

(c) No reason has been suggested why a tax upon a local business should be held void, if despite its burden, the local business is conducted at a profit; or if, although conducted at an apparent loss, the corporation desires to continue it because of benefits present or prospective;

(d) One can not avoid a tax upon a taxable business by also engaging in a nontaxable business;

(e) No decision of this court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely be-

cause the local and interstate branches are for some reason inseparable;

(f) Since the occupation tax challenged is not shown to be a direct burden upon the company's interstate business, the judgment against it is affirmed.

At page 413 of said opinion this court said:

"* * * But the high tax on the local privilege, like the low rate for the local traffic, if it burdens interstate commerce at all, does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce. 'The question of constitutional validity is not to be determined by artificial standards.' See *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 480, 52 S. Ct. 631, 634, 76 L. Ed. 1232, 84 A. L. R. 831. The alleged indirect tax must be judged by its practical operation.

"*In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an ad valorem property tax upon tangible property used exclusively in such business.* Each increases the necessary cost of doing the local business. Either might conceivably be so large as to render the local business immediately unprofitable. A common carrier cannot be compelled to carry on business indefinitely at a loss. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323; *Bullock* v. *Florida*, 254 U. S. 513, 520, 521, 41 S. Ct. 193, 65 L. Ed. 380; *Railroad*

Commission v. *Eastern Texas R. Co.,* 264 U. S. 79, 85, 44 S. Ct. 247, 68 L. Ed. 569. If, because of such loss, a corporation, seeing no prospect of betterment, wished to discontinue its local business and were prevented by law from doing so unless it discontinued also its interstate business, the law might be held void as imposing an unconstitutional condition upon the privilege of engaging in interstate commerce. Compare *Pullman Co.* v. *Adams,* 189 U. S. 420, 23 S. Ct. 494, 47 L. Ed. 877. If it was the tax which caused the unprofitableness of the local business and, consequently, the desire to discontinue it, the tax would then appear as a direct burden on interstate commerce. Compare *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 258, 39 S. Ct. 265, 63 L. Ed. 590; *Postal Telegraph-Cable Co.* v. *Fremont,* 255 U. S. 124, 127, 41 S. Ct. 279, 65 L. Ed. 545. But no reason has been suggested why a tax upon the local business should be held void, if, despite its burden, the local business is conducted at a profit; or if, although conducted at an apparent loss, the corporation desires to continue it because of benefits present or prospective. Compare *Ohio Tax Cases,* 232 U. S. 576, 590, 34 S. Ct. 372, 58 L. Ed. 737.

Second. Inherently the tax challenged is unobjectionable. It is not upon an instrumentality of interstate commerce; it is moderate in amount; and is not a disguised attempt to discriminate against interstate commerce. As the collection is being made by an action at law, the tax is not open to the objection raised in *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S.

530, 554, 8 S. Ct. 961, 31 L. Ed. 790, that payment may be made a condition of continuing to do business. Compare *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 119, 41 S. Ct. 45, 65 L. Ed. 165. The tax is 'imposed solely on account of the intrastate business;' and it appears that the amount exacted is not increased 'because of the interstate business done.' Compare *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, 51 S. Ct. 499, 500, 75 L. Ed. 1171. Although the two branches of the business of the companies are inseparable, the tax is not laid inseparably upon both. Thus it is not open to the objection held fatal in *Leloup* v. *Mobile*, 127 U. S. 640, 8 S. Ct. 1380, 32 L. Ed. 311, and *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 55 S. Ct. 477, 79 L. Ed. 934. 'Certainly one cannot avoid a tax upon a taxable business by also engaging in a nontaxable business.' *Raley & Bros.* v. *Richardson*, 264, U. S. 157, 159, 44 S. Ct. 256, 257, 68 L. Ed. 616 * * *."

When we consider that plaintiff uses every article that it purchases in conducting its intrastate commerce and that we do not find any reference in the complaint or the stipulation to the possible effect of the tax on plaintiff's profits or losses along with the *general* statement that plaintiff is compelled to purchase, use and consume a greater amount of property than it would purchase if it were engaged only in intrastate commerce, we submit that plaintiff *has not sustained* the burden imposed upon it

of proving the *direct* interference upon interstate commerce resulting from the imposition of this tax.

Certainly there might possibly be some remote burden, but in the case of property taxation on instrumentalities of interstate commerce we also find a remote burden which has been repeatedly held to be insufficient to invalidate the tax.

This court has recognized that the power to tax is vital to a state, and it has given to that power a form which permits some incursion on interstate commerce; i.e., it is only when the tax directly interferes with interstate commerce that it is invalidated.

The California Use Tax Act as written and administered:

(1) Imposes a tax solely for the privilege of using the materials in intrastate commerce;

(2) The amount exacted is not increased because of the interstate business done. The mere fact that more materials are purchased than would be the case if the plaintiff was engaged solely in intrastate commerce is immaterial for the obvious reason that all material purchased is subject to an *intrastate* use and the tax is imposed *because* of the intrastate use. The tax is measured by the selling price of the property regardless of the amount of business done—i.e., interstate or intrastate. The interstate commerce is not considered whatsoever but the incidence of the tax arises at the time it is stored, *used* or consumed in intrastate commerce.

(3) The tax does not fall on use solely in interstate commerce.

In so far as the fourth test laid down by the court in the *Cooney* case is concerned, we ask the court to consider, realizing the California use tax is imposed on intrastate use alone, the following language in the case of *Pacific Telephone and Telegraph Co.* vs. *Tax Commission, supra,* at pages 415, 416:

> "The distinction drawn by those cases between an occupation tax valid because laid only on local business and one void because laid inseparably upon the whole business is clearly shown in the discussion of the two classes of taxes involved in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 646, 647, 41 S. Ct. 606, 65 L. Ed. 1139. Taxes for the privilege of doing local business measured by the gross income of such business have frequently been laid upon concerns engaged in both intrastate and interstate business; and have, for half a century, been sustained *without inquiry whether withdrawal from the local business would compel discontinuance of the interstate.* That an occupation tax upon a foreign telegraph company measured by earnings from its local business is valid was indicated as early as *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460, 464, 465, 26 L. Ed. 1067; and was definitely held in *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229, which has been repeatedly cited with approval, in cases involving interstate railroads and telegraph companies.

Similarly, in *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 529, 530, 43 S. Ct. 192, 67 L. Ed. 375, a so-called franchise tax for the privilege of doing intrastate business, measured by a percentage of the value of property subject also to an ad valorem tax, was sustained as against both foreign and domestic railroads.

No decision of this court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable.

In cases relied upon by appellants, there are expressions which may seem to support that contention. But in none of those cases was the challenged tax measured by the gross income of the intrastate business only. In some it was laid inseparably upon the privilege of doing both interstate and intrastate business. In some the case was suggested of a compulsory local service which, coupled with a tax, might burden interstate commerce. In *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355, and *Pullman Co.* v. *Kansas,* 216 U. S. 56, 30 S. Ct. 232, 54 L. Ed. 378, the question presented and on which the Court divided, was whether payment of a confessedly unconstitutional tax could be made a condition of permitting a foreign corporation to exercise the privilege of continuing to do intrastate business within the state. *It is true that in Sprout* v. *City of South Bend,* 277 U. S. 163, 171, 48 S. Ct. 502, 505, 72 L. Ed. 833, 62 A. L. R. 45, *the Court when reciting the essentials of a valid license fee for doing local business, said that it must appear*

*'that the person taxed could discontinue the intrastate business without withdrawing also from the interstate.' But that statement was made in discussing the validity of a flat bus license fee, prescribed by an ordinance which made no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce; and it must be read in that context. The license fee was held void, because Sprout, who was engaged in both classes of commerce, could not escape payment of the tax by confining himself to interstate business. The cases cited by the Court in that connection were of the same character. * * *"*

In conclusion, we submit that the California use tax may validly be imposed upon the following uses by appellant of the property in question here:

1. The uses which are closely connected with appellant's interstate commerce but which occur prior to actual use in such commerce, namely, storage, withdrawal from storage, and installation;

2. Actual use in intrastate commerce notwithstanding the fact that such use is inextricably commingled with interstate use.

We submit, therefore, that the final decree of the lower court herein should be affirmed.

Respectfully submitted.

U. S. WEBB,
Attorney General of the
State of California,

H. H. LINNEY,
Deputy Attorney General,

JAMES J. ARDITTO,
Deputy Attorney General,
Attorneys for Appellees.

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